

Cheyenne River Sioux Tribe Consultation Talking Points

1. Consistent with the EPA's *Policy on Consultation and Coordination with Indian Tribes*, we are here to consult with the Cheyenne River Sioux Tribe about the proposed Underground Injection Control (UIC) permits and related aquifer exemption.
 - a. We are aware that these proposed EPA actions potentially affect tribal interests as outlined in the June 19, 2017 letters from Chairman Frazier.
 - b. We appreciate that the Cheyenne River Sioux Tribe provided comments on the proposed actions in 2017 and outlined topics and concerns for discussion during consultation.
 - c. We endeavor to ensure that consultation is a process of meaningful communication and coordination between EPA and tribal officials prior to the EPA taking actions or implementing decisions that may affect tribes. As the EPA July 2019 letter stated, the EPA is interested in hearing from tribes about four topics:
 - i. The proposed actions
 - ii. The revised Environmental Justice (EJ) Analysis
 - iii. Treaty Rights and
 - iv. The EPA's plan for compliance with Section 106 of the National Historic Preservation Act.
 - d. These are the items we have identified, but we would also like to hear from the Cheyenne River Sioux Tribe if there are additional topics you are interested in discussing. We are interested in hearing any concerns the Cheyenne River Sioux Tribe may have about the proposed Dewey-Burdock project and the proposed UIC actions.
 - e. We are prepared to provide some background information about the proposed UIC permits, aquifer exemption and other draft documents available for review and comment.
 - f. We have sent multiple invitation letters to Tribes: May 2013, November 2015, August 2016, May 2017 and July 8, 2019. (We sent two additional invitation letters to Chairman Frazier: 8/16 and 5/17.) The history of our consultation activities is summarized in Section 7.1 of the Environmental Justice Analysis and includes as an appendix to our NHPA compliance document.
 - g. **Timeline for consultation:** The opportunity for consultation has been a standing offer since our May 2013 letter. We appreciate the December 2015 response letter you sent in reply to our November 2015 invitation letter. As you are aware, we have been attempting to schedule a meeting with the Cheyenne River Sioux Tribe since early 2016.
 - h. We also offered web conferences in the spring of 2016 and fall of 2017 to provide more detailed information about the proposed actions.
2. Setting and Managing Expectations
 - a. We will be taking notes during our meeting 1) for the Administrative Record and 2) so that we can respond back to you on how we considered and addressed your input, comments and concerns during this consultation process.
 - b. You can provide additional information to the EPA after this meeting; that information will also be part of the record.
 - c. The EPA will take into account all input received through tribal consultation before issuing any final permit decision.
 - d. We will provide you with a final document describing how the EPA took into consideration the Cheyenne River Sioux Tribe's comments and concerns in the final permit decisions.
 - e. The UIC Program is authorized under the Safe Drinking Water Act to protect underground sources of drinking water by regulating injection wells.
 - f. While the Nuclear Regulatory Commission license and the South Dakota Large Scale Mine Permit regulates a wide scope of activities at the site, the UIC Permits impose requirements

only on the injection wells.

3. Background

- a. Class III permit and the Class V permit
 - i. The EPA's regulatory role compared to the Nuclear Regulatory Commission and the South Dakota Department of Environmental and Natural Resources.
 - ii. The EPA's authority is limited to the protection of Underground Sources of Drinking Water.
 - iii. **Key message:** the proposed permits do not automatically allow injection to occur. Both permits require the permittee to provide a lot of additional information to the EPA to evaluate before any injection activities can be authorized.
- b. Aquifer Exemption
- c. Related documents available for review and comment:
 - i. The EJ Analysis
 - ii. The NHPA document
 - iii. The Cumulative Effects Analysis

- 4. Executive Order 12898 directs federal agencies to identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations, to the greatest extent practicable and permitted by law.
 - a. The EPA's 2017 draft EJ analysis included a Study Area comprised of a 20-mile buffer zone measured from the approximate Dewey-Burdock Project Area Boundary.
 - b. The EPA conducted a preliminary screening process of the Study Area based upon demographic and environmental indicators, as well as a more targeted preliminary screening of an area comprised of a 5-mile radius around Edgemont, South Dakota, which lies within the Study Area.
 - c. Based on previous Tribal consultation discussions as well as comments received during the public hearings and public comment period, the EPA has expanded the Environmental Justice analysis to examine the proximity of the proposed project to the Black Hills as a sacred site and
 - d. The updated EJ analysis also includes additional information on various treaties.
 - e. Although we have expanded the scope of the EJ analysis beyond the permit area to include the Black Hills, our regulatory authority is limited to protection of USDWs.
 - f. We also have some limited regulatory authority to include mitigation measures for the protection of historic properties under the National Historic Preservation Act and to protect threatened or endangered species and critical habitat under the Endangered Species Act.
 - g. We would like to hear any concerns specifically related to the Cheyenne River Sioux Tribe's interest in the Black Hills as a sacred site.
 - h. We would also welcome any input the Tribe would be willing to offer to assist the EPA in presenting an accurate picture of environmental justice issues related to the Black Hills.
- 5. The EPA Treaty Rights guidance provides affirmative steps for the Agency to take during tribal consultations when an EPA action occurs in a specific geographic location and a resource-based

treaty right, or an environmental condition necessary to support the resource, may be affected by EPA's action.

- a. We have received input on treaty rights from three tribes that provided comments during the 2017 public comment period (CRST, OST, SRST).
 - b. We understand the Cheyenne River Sioux Tribe is concerned that the Dewey-Burdock ISR site (Site) poses a serious threat to the Tribe's Treaty Rights and Reserved Water Rights.
 - The Cheyenne River forms the southern border of our reservation and flows into the Missouri River after it flows through the Black Hills and near the Site.
 - In 2005, when a drought threatened the Tribe's only source of drinking water, which is drawn from an intake at the confluence of the Cheyenne River and the Missouri River at Lake Oahe, the US Army Corps of Engineers determined that the loss of this water source (decrease in water quantity and degraded water quality) would devastate the Tribe.
 - The Tribe retains reserved water rights in off-reservation waterways and other bodies of water in the Missouri River Basin (including the Cheyenne River) as well as groundwater and aquifers outside its Reservation.
 - Impacts to off-reservation tributaries and aquifers belonging to the Lake Oahe hydrologic system and will impact the Tribe's retained hunting and fishing rights in Lake Oahe.
 - c. Specifically, the EPA seeks input on the following questions:
 - (1) Do treaties exist within the project area? The Cheyenne River Sioux Tribe has referenced the Fort Laramie Treaties of 1851 and 1868 and provided a map of the 1851 territory.
 - (2) What treaty rights exist in, or what treaty-protected resources rely upon, the project area? Among other things, have treaty-based groundwater rights in the project area been recognized by judicial decree or congressional settlement? The Cheyenne River Sioux Tribe has referenced the Fort Laramie Treaties of 1851 and 1868 and Public Law 83-776 providing for the acquisition of lands for the Oahe Reservoir. Researching PL 83-776, I found PL 106-53, transferring use of Army Corps of Engineer lands to the Cheyenne River Sioux Tribe for use in perpetuity, and PL 106-541 requiring a study of sediment contamination in the Cheyenne River and appropriate remedial action to eliminate any public health and environmental risk posed by the contaminated sediment. The USGS prepared a report in cooperation with the Cheyenne River Sioux Tribe that was published in 2012.
 - (3) How are treaty rights potentially affected by the revised draft permits? The Cheyenne River Sioux Tribe has indicated its concern about impacts to the Cheyenne River, which forms the southern border of the reservation and their water supply intake is at the confluence of the Cheyenne River and the Missouri River in the Oahe Reservoir.
 - (4) Any concerns you have related to treaty rights. The Cheyenne River Sioux Tribe has indicated its concern about the Tribe's retained water rights and the Tribe's retained hunting and fishing rights in Lake Oahe.
6. The EPA has a separate responsibility under section 106 of the National Historic Preservation Act (NHPA) to consult with tribes that attach religious and cultural significance to historic properties that may be affected by an undertaking.
- a. The EPA is seeking input on potential historic properties, including those of traditional religious and cultural importance, within the Dewey-Burdock area of potential effect.
 - b. Are there any concerns related to historic properties that the Cheyenne River Sioux Tribe

would like to discuss?

7. We understand that the Cheyenne River Sioux Tribe may raise issues in consultation that should be kept confidential and nonpublic.
 - a. During the course of our consultation process, please identify early on any information that you would like to provide, but that you believe should remain confidential.
 - b. We will explore options for keeping the information confidential in accordance with 36 CFR § 800.11(c).
 - c. As we move forward with the consultation process, please be aware that any information you provide to the EPA in writing will become a part of the public record unless other arrangements are made to maintain confidentiality.
 - d. It has to be a “historic property” under the ACHP regs, but that’s not a formal classification. “Historic property means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.” 36 CFR 800.16(l)(1). “Eligible” includes properties that meet the National Register criteria, even if there hasn’t been any formal finding to that effect.
- a. The thing to be sure that tribes understand when we are talking about withholding information under 36 CFR § 800.11(c) is that we have to consult with the Secretary of the Interior about each decision. There is a designated official for that purpose, but it’s still not a trivial step. So that’s why, if the tribe has a confidentiality concern, we’d like to talk about it with them early in the process and before they submit the information.